

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 June 2024

**Public Authority:** The Governing Body of the University of Cambridge

**Address:** The Old Schools  
Trinity Lane  
Cambridge  
CB2 1TN

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to an article namely "Fredrick Jackson Turner's Frontier Thesis, Orientalism, and the Austrian Militärgrenze". The University of Cambridge (the university) refused to confirm or deny whether the information was held citing section 40(5B) (a)(i) of FOIA.
2. The Commissioner's decision is that the university is not entitled to rely on section 40(5B) (a)(i) of FOIA and that it should have relied on section 40(2) of FOIA to withhold parts of the information.
3. The Commissioner requires the university to take the following steps to ensure compliance with the legislation.
  - Disclose information in relation to parts 1a, 1b, 2, 3b and some of the information contained in part 4a of the request.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.]

## Request and response

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5. On 30 September 2023, the complainant wrote to the university and requested information in the following terms:

"I request information relating to an article titled "Fredrick [sic] Jackson Turner's Frontier Thesis, Orientalism, and the Austrian Militärgrenze" (<https://doi.org/10.5325/jaustamerhist.2.1.0001> <https://www.jstor.org/stable/10.5325/jaustamerhist.2.1.0001>). The work is by [name redacted] (information redacted). I believe that there is substantial public interest in the disclosure of information relating to the case, which has attracted attention in the international press (e.g. <https://www.ft.com/content/ae7f16ae-95ab-4aae-a676-0748e3e61b6d>).

I specifically request the following recorded information:

1. (a) The published version of the work (it is an open-access article distributed under the terms of the Creative Commons Attribution CC-BY-NC-ND, but now difficult to obtain).

(b) All versions of the work submitted for potential publication (to any publisher). If available, I would prefer these in formats that can show how the document has been edited, such as using Microsoft Word's "track changes" function.

2. The full text of all known uncredited sources for the work. I believe that this consists of two student essays. Please also describe the nature of such sources, e.g. work submitted for university examination or for a supervision.

3. (a) All results from plagiarism detection services, e.g. iThenticate or Turnitin, applied to (any version of) the work.

(b) Manual identification of which parts of the work originated from uncredited sources.

4. (a) The scope of the University's subsequent investigation by a disciplinary panel.

(b) Explanation by [name redacted] to the panel explaining the presence of material from student essays within the published work

(c) The panel's final conclusions.

(d) The panel's final reasoning behind such conclusions.

(e) The membership of the panel.

6. The university responded on 27 October 2023 and confirmed that it held the information. However, it refused to provide it citing section 40(3A) (a) of FOIA as its basis for doing so.
7. Following an internal review the university revised its position to neither confirm nor deny whether the information falling within the scope of the complainant's request is held. It stated that to confirm or deny whether the information is held would contravene the first data protection principle in unfairly disclosing personal data into the public domain. It relied on section 40(5B) (a)(i) as its basis for doing so.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 5 January 2024 to complain about the way their request for information had been handled. They provided evidence in the form of news publications and argued that section 40(5B) (a)(i) does not apply as the information is already public knowledge.
9. During the Commissioner's investigations, the university confirmed that the information requested with the exception of the complainant's request at part 3a was held. It stated that no such automated analysis was undertaken.
10. It took the view that all the information held in connection with the disciplinary case (including the text of the withdrawn article and any early drafts of it, and any analyses of its text with regard to its plagiarised content) is the personal information of the data subject.
11. It added that notwithstanding the extant press articles surrounding this matter, detailed facts of the case were not common knowledge. It therefore decided that confirming or denying whether the information is held would constitute unfair and unlawful processing of personal information of the data subject who is the author of the article.
12. The Commissioner requested the withheld information from the university. Having considered this, he is of the view that section 40(5B) (a)(i) is not engaged and that the university should have maintained its original decision that the disclosure of the information would contravene the data protection principles.
13. Therefore, other than the complainant's request in part 3a which the university confirms it does not hold, the Commissioner considers that the scope of his investigation is to determine whether the disclosure of the withheld information pertaining to parts 1a to 4e of the

complainant's request would contravene the data protection principles thereby engaging section 40(2) of FOIA.

14. The university has provided the Commissioner in confidence with reasons why it could not confirm or deny whether the information is held. However, the Commissioner has decided that disclosure of the withheld information would breach the Data Protection principles and constitute unfair and unlawful processing of the personal information of the data subjects.

## **Reasons for decision**

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### **Section 40 - personal information**

15. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A) (3B) or 40(4A) is satisfied.
16. In this case the relevant condition is contained in section 40(3A) (a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

19. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

22. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
23. In its submission to the Commissioner, the university stated that all the information requested comprises of the personal data of the author of the article in question, as well as the student who made the accusation, other staff involved as case handlers or witnesses and members of the relevant disciplinary panel.
24. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that some the information does relate to the data subject who is the author of the article as well as other third parties who were involved in the relevant disciplinary process.
25. However, the Commissioner does not consider that parts 1a, 1b, 2 and 3b of the complainant's request constitutes personal data. This comprises of the published version of the work and all versions of the work submitted for potential publication as well as the full text of all known uncredited sources and the manual identification of the parts of the work which originated from uncredited sources. The Commissioner has carefully examined this information and considers that even though some parts mention names of other third parties, these are by way of references and reflects information that is already publicly available.
26. The personal information of the data subject in this part of the request is in reference to their work as an author. The Commissioner believes that the actual content to this version of the work, does not contain the personal data of the data subject. Although, he recognises that some reviewer comments may constitute third party personal data, he is of the view that, these could be redacted without affecting the main content of the article in question.
27. Having regard to the fact that there is substantial information in the public domain, i.e., the name of the data subject appearing in press publications, it will be of little benefit to redact the name of the data subject from the published version of the work. The Commissioner considers that the disclosure of the published version together with other versions that was presented for publication will not contravene the data protection principles.
28. The Commissioner must now establish whether disclosure of the remaining information would breach any of the Data Protection principles.

## **Would disclosure contravene principle (a)?**

29. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

## **Lawful processing: Article 6(1)(f) of the UK GDPR**

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>1</sup>.

33. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test: -

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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<sup>1</sup> Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interest test**

35. In relation to the withheld information concerning the complainant's request at parts 4a to 4e, the Commissioner has considered the legitimate interest in disclosing the withheld information to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin the FOIA or may represent the private concerns of the requester.
36. The university considers that the withheld information relates to the personal information of the of the data subject. It states that it struggles to accept that the public has any genuine legitimate interest in receiving the details or materials in connection with a disciplinary case against an individual member of the academic staff. Although it accepts the legitimate interest of the public in receiving statistical information, it does not consider that there is a legitimate interest pursued in this case.
37. The complainant has argued that the subject of the request relates to plagiarism committed by the data subject who is a member of the governing body of the public authority. They state that the matter has received substantial public attention, having been reported in international, national, and local press.
38. They also state that a spokesperson from the university issued a statement to the press on the matter as well as the data subject's own statement confirming that the University Tribunal had concluded that they were guilty and upheld the complaint. The Commissioner has not had sight of either the university's or the data subject's statement to the press.
39. Whilst the Commissioner recognises that the complainant has not expressly stated any specific legitimate interests for the disclosure of the information, he can see how the matter surrounding a university professor who was found guilty of plagiarism would be of interest to the public. Therefore, the Commissioner accepts that there is a legitimate interest being pursued this case.

### **Is disclosure necessary?**

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
41. The Commissioner has carefully examined the withheld information contained in parts 4a to 4e of the complainant's request. He has also considered the information that is already in the public domain and takes the view that details of the internal HR disciplinary process is not already public knowledge. While he acknowledges that there is some information out there, he is of the view that there is no less intrusive means of achieving the legitimate aim identified.

### **Balancing test**

42. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
44. The university has explained how the data subjects whose personal information are contained in this disciplinary case would suffer unnecessary and unjustified damage and distress. It has emphasized that confidentiality of the disciplinary process was stressed to all parties throughout. Although it recognises that some information entered the public domain through the inappropriate actions of others, it does not consider that it should add to the damage and distress in revealing certain circumstances of the case.



45. The university further argued that the data subject's confidentiality and privacy rights and expectations outweigh any marginal legitimate interest that the public may have in scrutinizing the materials held about the details of the case in question.
46. The Commissioner recognises that in some cases the consequences of the potential harm or distress that disclosure would cause is clear. For instance, disclosing the identity of a person who made a complaint could lead to them experiencing threats and harassment. He has carefully considered the withheld information and in light of the nature of the information held, his view is that, the disclosure of such information is likely to cause potential harm or distress to the data subject and other third parties.
47. The Commissioner is not convinced that the legitimate interest in this request outweighs the rights and freedoms of the data subject(s). He does not see how releasing details of an internal HR disciplinary process would be of interest to the public. Releasing such information under FOIA would constitute unfair processing of personal data which would also cause distress to the data subjects.
48. The Commissioner therefore considers that there is not Article 6 basis for processing and so disclosure would not be lawful and the university is right to withhold this part of the information under section 40(2) of FOIA.

## **Right of appeal**

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49. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963  
Fax: 0870 739 5836  
Email:

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**